sufficiency of the plat which the statute requires shall accompany the petition, is not sustained by the record, and was properly overruled.

Upon the whole case, we are of opinion that the law on the demurrer to the petition is with the plaintiff in error, and it must, consequently, be overruled, and the case remanded for further proceedings.

Reversed.

Note.

This is the first time that section of the Code, passed no doubt at the suggestion of the court in Charlottesville *v.* Maury, 96 Va. 383, has been before the court for construction, and Judge Whittle decides that those enactments confer upon public service corporations the power to condemn interests in land other than the entire interest, when a partial and not the entire interest is needed for the purposes of the corporation. The court's construction of this statute will undoubtedly meet with the approval of all, and furnish an excellent opportunity for the court to apply that well known rule in the construction of statutes that the primary object in the interpretation of statutes is to ascertain and give effect to the intention of the lawmakers, and for that purpose they may consider the old law, the mischief and the remedy. At the same time and to avoid the injustice that might result to the owner from a too narrow construction of the term "estate used" in the limitation, they held that it required the condemnation of the entire estate in the property proposed to be taken, and that it was not competent to carve an inferior estate (e. g., an estate for life or years) out of the fee simple, and to have condemned the lesser estate, leaving the reversion in the owner; thus applying that fundamental principle in the construction of statutes that wherever a statute is capable of two constructions, one of which would work manifest injustice, and the other would work no injustice, it is the duty of the court to adopt the latter, as it can scarcely be presumed that an injustice was in the legislative intent.

HART *et al. v.* DARTER *et al.*

Sept. 12, 1907.

[58 S. E. 590.]

Wills—Equity—Jurisdiction—Construction of Wills.—Testator devised all his lands to his six living children, and provided that "if one sells, sell it to one of six, and if one dies with esue, its part shall go to the other children." Held, that a court of equity was without jurisdiction of a bill to construe such clause of his will, and to have it adjudged that the words "with esue" meant "without issue," and determine whether devisees could sell to persons other than devisees; devisees under such clause of the will obtaining purely legal titles, and the construction of wills not being of itself a ground of equity

jurisdiction, but only an incident to the court's jurisdiction on some one of the recognized grounds of equity jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1666.]

Appeal from Circuit Court; Scott County.

Bill by W. H. Hart and others against M. L. Darter and others. Decree for defendants, and complainants appeal. Affirmed.

Richmond & Bond, for appellants.
W. S. Cox, for appellees.

BUCHANAN, J. In the year 1882 the will of Eyre Hart, deceased, was admitted to probate. The object of this suit, which was instituted by certain of the devisees under the sixth clause of the will, was to have that clause, which is as follows, construed:

"I will all my lands to my 6 living children, Elizabeth Hobbs has received her full portion of all I possess, my living children W. H. Hart, B. F. Hart, M. Doniho, M. S. Darter, J. B. Hellon, Virginia Hart, and if one sells, sell it to one of six, and if one dies with esue, its part shall go to the other children."

The trial court, upon a hearing of the cause, dismissed the bill without prejudice to the rights of any party, upon the ground that the case was not in such a condition as to permit a decision of the matter in issue.

It appears from the record that the devisees under the sixth clause of the will partitioned the land devised them and took possession of their respective shares; that all the devisees are living, some having children and others none; that some have aliened their interest in the land devised to persons other than devisees. The bill alleges that doubt and uncertainty exist as to the exact rights of the parties in the land devised, which greatly incumber and hamper the complainants in dealing with their interest in the same, and that the complainants are advised that it is necessary, in order to ascertain the respective interests of the devisees, to have the will judicially construed. The prayer for relief is that the court will construe the sixth clause of the will and adjudge that the words "with esue" therein be held to mean "without issue," and determine whether the devisees who have attempted to alien their interest had a legal right to sell to persons other than the devisees under that clause, to determine any other matter deemed pertinent by the court or required by any party in interest, and for general relief.

While the bill prays for general relief, it is clear from its allegations that the suit was brought solely for the purpose of having the sixth clause of the will construed by the court, and that no case is made for further relief. The first question, therefore, to be determined, is whether or not a court of equity has jurisdiction of the case made.

The courts are not in accord as to the ground of the jurisdiction of a court of equity to interpret and enforce the provisions of a will. Some hold that such jurisdiction is merely an incident to its general jurisdiction over trusts, and that it will not exercise its powers to construe a will which only deals with and disposes of purely legal estates or interests in land, and makes no attempt to create any trust relation in respect to the property devised. Others hold that its jurisdiction arises from the complicated character of the provisions of the will, from the difficulty of understanding their meaning, and from the doubt and uncertainty as to the rights of the parties claiming under them. Sec. 3 Pom. Eq. Jur. §§ 1155 to 1157, and cases cited; note to Crosson v. Dwyer, 2 Am. & Eng. Dec. in Eq. 687-690, and cases cited. But the prevailing doctrine in this country is that, in order to give a court of equity jurisdiction to take cognizance of and construe or interpret a will, there must be an actual litigation in respect to a matter which is the proper subject of jurisdiction of a court of equity as distinguished from a court of law.

Pomeroy, in discussing this question, says (section 1156) that "the doctrine which seems to be both in harmony with principle and sustained by the weight of authority is that the special jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts; that a court of equity will never entertain a suit brought solely for the purpose of interpreting the provisions of a will, without any further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations with respect to the property donated."

In the case of Chipman v. Montgomery, 63 N. Y. 221, 230, it is said: "The rule is that to put a court of equity in motion there must be an actual litigation in respect to matters which are the proper subjects of the jurisdiction of that court, as distinguished from a court of law. It is by reason of the jurisdiction of courts of chancery over trusts that courts having equitable powers as an incident to that jurisdiction take cognizance of and pass upon the interpretation of wills. They do not take juridiction of actions brought solely for the construction of instruments of that character, nor when only legal rights are in controversy." 3 Pom. Eq. Jur. § 1155.

In this state, as in England, courts of equity have jurisdiction over the administration and settlement of decedents' estates, whether the deceased die with or without a will, and in the exercise of and as incident to that jurisdiction they construe and enforce wills of personal property. See Pom. Eq. Jur. § 1155; Adair v. Shaw, 1 Sch. & Lef. 243, 262; Nelson v. Cornwell, 11 Grat. (Va.) 724, 737.

The English courts of chancery, under their general jurisdiction over trusts, had the power to construe and enforce wills of real as well as of personal property, so far as they create or their disposition involves the creation of trusts; but "so far," says Pomeroy, "as a will of real property bequeaths purely legal titles, and the devisees therein obtain purely legal titles to the land given, the enforcement thereof belongs to the courts of law by means of the action of ejectment, the courts of law having full power to construe and interpret the instrument and to determine the rights of the devisees. There is no necessity, and therefore no power, of resorting to a court of equity in order to obtain a construction of such wills." Section 1155; Bowers *v.* Smith, 10 Paige (N. Y.) 193; 16 Cyc. 54-101.

No case involving the precise question now under consideration has been before this court; but in the case of Snyder *v.* Grandstaff, 96 Va. 482, 31 S. E. 647, 70 Am. St. Rep. 863, it was treated as settled law by the learned circuit judge who decided the case, and whose opinion was approved and adopted by this court, that the construction or interpretation of wills and deeds was not of itself a ground of equity jurisdiction, but that the power to construe such writings was simply an incident to the court's jurisdiction over a case on some one of the recognized grounds of equity jurisdiction. This view, as we have seen, is in accord with correct principles, is sustained by the weight of authority, and should be adhered to, although perhaps not necessary to a decision of that case.

The cause of the will which this suit was brought to have interpreted, whatever the interest given be, it is clear, disposes of purely legal estates or interests and makes no attempt to create any trust relation in respect to the land devised. There being no trust relation involved in the devise, and no other ground of equity jurisdiction shown, the bill was properly dismissed by the circuit court, and its decree must be affirmed.

Note.

This case confirms the opinion maintained by many that the dicta contained in the cases is of vast importance, and is often the only judicial utterance that can be found on important propositions of law and procedure. The decision in the principal case is supported by the great preponderance of authority in other jurisdictions; in Connecticut, in Security Co. *v.* Pratt, 65 Conn. 161; in Illinois, in Longwith *v.* Riggs, 123 Ill. 258; in Nebraska, in Kennedy *v.* Merrick, 46 Neb. 260; in New Hampshire, in Greeley *v.* Nashua, 62 N. H. 166; in New York, in Washburn *v.* Cope, 144 N. Y. 287; in North Carolina, in Alsbrook *v.* Reid, 89 N. C. 151; in Ohio, in Bowen *v.* Bowen, 38 O. St. 426; in Vermont, in Moss *v.* Lyman, 64 Vt. 167; in West Virginia, in Martin *v.* Martin, 52 W. Va. 381; in Wisconsin, in Miller *v.* Drane, 100 Wis. 1.

The rule laid down in the principal case applies of course only to

suits brought solely for the construction of wills, where no trust is involved. For it is well settled that the power of courts of equity to construe wills will be exercised liberally on behalf of executors, trustees, or other persons interested in trusts created by will. See Christian *v.* Worsham, 78 Va. 100; Osborne *v.* Taylor, 12 Gratt. 117; McCrum *v.* Lee, 38 W. Va. 583, 18 S. E. 757.

Accordingly, as an executor is regarded as a trustee of his testator's personal property, even though no express trust is created by the will, equity will entertain suits by executors for the construction of wills of personal property, where they would refuse to construe devises of real estate. Bowers *v.* Smith, 10 Paige (N. Y.) 193; Greyston *v.* Clark, 41 Hun (N. Y.) 125; Wager *v.* Wager, 89 N. Y. 161; Read *v.* Williams, 125 N. Y. 560; Underwood *v.* Curtis, 127 N. Y. 523; Simmons *v.* Hendricks, 8 Ired. Eq. (N. C.) 84.

In a few states, however, a more liberal doctrine prevails, by virtue of which courts of equity take jurisdiction of suits for the construction of wills on the ground of its uncertainty, without regard to the existence of a trust, express or implied. Benham *v.* Hendrickson, 32 N. J. Eq. 441; Carroll *v.* Richardson, 87 Ala. 605; Crosson *v.* Dwyer, 9 Tex. Civ. App. 482.

BOWLING, SPOTTS & CO. *v.* DAVIDSON *et al.*

Nov. 21, 1907.

[59 S. E. 368.]

1. Assignments for Benefit of Creditors—Validity—Questions for Court.—Whether or not a deed of trust for the benefit of creditors is, as a matter of law, fraudulent because it contains a stipulation irreconcilable with an honest purpose, is for the court from an inspection of the deed itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments for Benefit of Creditors, § 1070.]

2. Same—Reservations—Effect.—A stipulation in a deed of trust for the benefit of creditors, which, after authorizing the trustee to continue the business of the grantor, reserves to the grantor the power to require the trustee to close up the business and sell the property, is not inconsistent with the objects of an assignment for the benefit of creditors, and does not render the deed void as fraudulent, though a deed reserving power inconsistent with the avowed objects thereof is per se fraudulent.

Appeal from Circuit Court, Bath County.

Suit by Bowling, Spotts & Co. against J. Graham Davidson and others. From a decree for defendants, complainant appeals. Affirmed.

J. M. Perry, for appellant.
Greenlee D. Letcher, for appellees.